89-1307

No. 89-

UNITED STATES SUPREME COURT

October Term 1989

MR. W FIREWORKS, INC.,

Petitioner,

v.

ELIZABETH DOLE, Secretary of Labor, United States Department of Labor,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Jonathan R. Harkavy
P.O. Drawer Y
Greensboro, NC 27402
(919) 274-2992

Counsel of Record

Of Counsel:

Norman B. Smith
Smith, Patterson, Follin, Curtis, James, Harkavy & Lawrence
P.O. Drawer Y
Greensboro, NC 27402

L. Bruce Fryburger
1661 Frost Tower
San Antonio, TX 78205

QUESTIONS PRESENTED

I. Does the Fair Labor Standards Act's "amusement or recreational establishment" exemption apply to establishments located outside recreational areas and whose primary activity is selling inexpensive goods intended solely for amusement?

II. May the district courts deny leave to amend an answer under Fed.R.Civ. Proc. 15(a) solely on the basis of delay, absent findings of bad faith or prejudice to the opposing party?

PARTIES

The parties to this proceeding are the petitioner (defendant below), Mr. W Fireworks, Inc., a closely held corporation with no parent companies, affiliates or subsidiaries, and respondent (plaintiff below) Elizabeth Dole, Secretary of Labor, United States Department of Labor.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes and Rules:

Other Authorities:

No. 89-

UNITED STATES SUPREME COURT

October Term 1989

MR. W FIREWORKS, INC.,	)
Petitioner,	)
v.	)
ELIZABETH DOLE, Secretary of Labor, United States Department of Labor,	)
Respondent.	)

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Petitioner, Mr. W Fireworks, Inc. ("Mr. W") prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered on November 16, 1989.

OPINIONS BELOW

The decision of the court of appeals is unreported and appears at pp. A1-A20 in the separate appendix to this petition. The

judgment of the district court is set out at pp. A50-A51. The opinions and orders of the district court are not reported and appear at pp. A21-A49.

JURISDICTION

The judgment of the court of appeals was entered on November 16, 1989. This petition is being filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES AND RULES

Section 13(a)(3) of the Fair Labor Standards Act of 1938, 29 U.S.C. § 213(a)(3):

> The provisions of sections 206 (except subsection (d) in the case of paragraph (1) of this subsection) and section 207 of this title shall not apply with respect to -
>
> (3) any employee employed by an establishment which is an amusement or recreational establishment, organized camp, or religious or non-profit educational conference center, if (A) it does not operate for more than seven months in any calendar year, or (B) during the preceding calendar year, its average receipts for any six months of such year were

not more than 33 1/3 per centum of its average receipts for the other six months of such year, except that the exemption from sections 206 and 207 of this title provided by this paragraph does not apply with respect to any employee of a private entity engaged in providing services or facilities (other than, in the case of the exemption from section 206 of this title, a private entity engaged in providing services and facilities directly related to skiing) in a national park or a national forest, or on land in the National Wildlife Refuge System, under a contract with the Secretary of the Interior or the Secretary of Agriculture;...

Rule 15(a), Federal Rules of Civil Procedure, 28 U.S.C.:

(a) Amendments. A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of

the amended pleading, whichever period may be the longer, unless the court otherwise orders.

STATEMENT OF THE CASE

1. Mr. W is a family owned corporation which imports fireworks, primarily from Asia, and sells them in South Texas at roadside stands. Mr. W has been in this business for about 25 years. It constructs wooden fireworks sales stands, rents sites from landowners and provides for electrical service to the stands.

Fireworks may be sold lawfully in Texas only during two short seasons each year: the 13-day period from December 19 through New Years Eve and the 11-day period from June 24 through July 4. Mr. W recruits operators for these stands at the beginning of each season, provides each operator with inventory as needed, and settles financially with each operator at

the end of the season when the unused inventory is returned. The operators are compensated by means of a commission arrangement based on the retail value of the fireworks they sell.

During the selling season, the operators exercise complete control over hiring, firing and supervising their own employees (the majority of whom are family members). The stands operate long hours during these short seasons, with closing times varying between 9 p.m. and 3 a.m.

The fireworks sold at Mr. W's stands are inexpensive, typically selling for 1 cent to 35 cents. Purchasing fireworks often is itself a festive event, and some customers explode their fireworks immediately after buying them, either in front of the stand or across the street. (Rec. Item no. 48, 1985 transcript, pp. 423-25, 513) Peak usage of the fireworks occurs at

midnight on New Years Eve and after dark on July 4th, and peak sales immediately precede these peak usage periods.

2. Respondent, the Secretary of Labor ("Secretary"), brought suit against Mr. W on November 16, 1983 in the Western District of Texas alleging violations of the record keeping, minimum wage and overtime provisions of the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, as amended; 29 U.S.C. §§ 201 et seq. ("FLSA"). The basis for jurisdiction in the district court was 29 U.S.C. § 217 and 28 U.S.C. § 1337.

Mr. W denied liability, asserting first, that its stand operators were independent contractors; second, that it was entitled to an "amusement and recreational establishment" exemption under § 13(a)(3) of the FLSA; third, that its stand operators were exempt "outside

salesmen" under § 13(a)(1) of the FLSA; and fourth, that commissions received by its stand operators were sufficient to discharge Mr. W's liability as provided in 29 U.S.C. § 207(i).

The case was tried to the district court without a jury from July 29 through July 31, 1985. On January 29, 1986 the district court decided that the fireworks vendors were independent contractors and thus outside the FLSA's coverage. The Secretary appealed, and the United States Court of Appeals for the Fifth Circuit reversed the judgment of the district court, ruling only on the independent contractor issue and remanding questions about other possible exemptions to be addressed first by the district court. Brock v. Mr. W Fireworks, Inc., 814 F.2d 1042 (5th Cir. 1987). Mr. W's petition for a writ of certiorari on the independent

contractor issue was denied by this Court on November 2, 1987. 484 U.S. 924 (1987).

On remand, the district court decided on July 16, 1987 that Mr. W was not entitled to the "amusement and recreational establishment" exemption (A21-A27).[1] On February 16, 1988 Mr. W moved to amend its answer to assert the defense that its stand operators are exempt as "administrative" employees under § 13(a)(1) of the FLSA. On March 28, 1988 the district court denied that motion (A28). On May 4 and 13, 1988 the case was further tried to the court, and on June 15, 1988 the district court entered its judgment and opinion holding Mr. W liable for minimum wage and overtime compensation of $225,423.61 and imposing injunctive relief requested by the

---

[1]The district court also decided that Mr. W was not entitled to the "outside salesmen" exemption (A25). Mr. W did not appeal that decision.

Secretary (A50).

Mr. W appealed the district court's decision, and on November 16, 1989 the court of appeals affirmed the judgment of the district court, holding that Mr. W is not entitled to the "amusement or recreational establishment" exemption because its income derives from the sale of goods and because the fireworks sales were not intended for use in a geographically distinct recreational area. (A5-A10) The court of appeals also held that the district court did not abuse its discretion in holding that "administrative" employee exemption was unavailable to Mr. W because of its delay in seeking to amend its answer to claim this exemption (A10-A12).

REASONS FOR GRANTING THE WRIT

I. THE SCOPE OF THE "AMUSEMENT OR RECREATIONAL ESTABLISHMENT" EXEMPTION PRESENTS AN IMPORTANT UNRESOLVED ISSUE UNDER THE FLSA WHICH THE COURT OF APPEALS IN THIS CASE DECIDED CONTRARY TO THE HISTORY AND POLICY OF THE EXEMPTION.

1. The scope of the "amusement or recreational establishment" exemption is an unresolved issue important to employers and employees and to the administration of the FLSA which "has not been, but should be" resolved by this Court. Supreme Court Rule 10.1(c). It is unclear from the cases construing this exemption whether it may ever apply outside geographically distinct amusement or recreational areas and whether it may ever apply to any business whose income is primarily from the sale of goods. In this regard, it is noteworthy that the Secretary certified to the court of appeals that the important issues of exemptions to the FLSA in this case "are

central to the Secretary's ability to effectively enforce the [FLSA]..." Brief for Secretary, unnumbered first page, (No. 88-5574).[2]

The issue of the meaning and practical reach of the "amusement or recreational establishment" exemption is presented cleanly by this case, for the court of appeals held on the basis of its prior decision in Brennan v. Texas City Dike & Marina, Inc., 492 F.2d 1115, 1118-20 (5th Cir.), cert. den. 419 U.S. 896 (1974), that Mr. W was not entitled to the § 13(a)(3) exemption because the exemption "was not intended to cover establishments whose sole or primary activity is selling goods" (A7) and because the exemption "was designed solely for those establishments whose sales were intended for consumption in a

---

[2]The Secretary does not contest the seasonal nature of Mr. W's business. Brief for Secretary, p. 16.

'geographically delimited recreational area'" (A7). The Fifth Circuit itself recognized many years ago in Brennan v. Texas City Dike & Marina, Inc., supra, that the absence of a unifying priciple makes [FLSA's] exemptions' interpretation a difficult task." 492 F.2d at 1117. The court noted particularly that the definition of an "amusement or recreational establishment" had not been "judicially explored." 492 F.2d at 1118. Little has changed in nearly two decades, except that the need for an authoritative nationwide interpretation of what Congress meant by the term "amusement or recreational establishment" is now heightened as Americans are increasingly concerned with leisure-time activities involving the purchase of goods for their amusement. The decision of the court of appeals, denying the exemption on grounds unsupported by the

FLSA's language, history and policy, thus brings an important issue into clear focus and calls for review of this unresolved point critical to employers and employees alike.

2. The judicial and administrative authority construing § 13(a)(3) reveals a confusing array both of outcomes and of rationales. For example, marinas which sell and service boating and fishing gear have been held non-exempt by the Fifth Circuit where located along a public seashore, Brennan v. Texas City Dike & Marina, Inc., supra, while a similar facility located on the shore of a lake under supervision of the U.S. Corps of Engineers has been held entitled to an exemption. Donovan v. Fairfield Bay Community Club, Inc., 1983 Lab. Cases (CCH) ¶ 34,511 (E.D. Ark.). Similarly, an establishment operating bus tours of a

battlefield and selling tourist goods was deemed entitled to the § 13(a)(3) exemption (subject to the seasonality requirement), Wage-Hour Op. 123, BNA Wage-Hour Manual 91:861 (April 19, 1971), while a similar business which permitted its buses to be used for some non-recreational purposes was deemed not entitled to the same exemption. Webb v. Music City Service, Inc., 85 Lab. Cases (CCH) ¶ 33,738 (Tenn. App. 1978). Likewise, there is no uniformity of result with respect to private country clubs. Compare Brock v. Louvers & Dampers, Inc., 817 F.2d 1255 (6th Cir. 1987) with administrative interpretations collected in Annot., "What Constitutes 'Amusement or Recreational Establishment' Within the Meaning of Seasonal Amusement Exemption from Fair Labor Standards Act," 88 A.L.R. Fed. 880 (1988).

The lack of a coherent common rationale for construing the "amusement or recreational establishment" exemption is the obvious cause of this idiosyncratic welter of results. In the Fifth Circuit an income test is the principal determinant of the exemption's scope. Brennan v. Texas City Dike & Marina, Inc., supra, 492 F.2d at 1119. If an establishment's income results primarily from the sale of goods, the exemption is unavailable unless the goods are inexpensive and their sale and consumption is confined to a supervised, geographically delimited recreational area (A6-A8). Elsewhere, however, availability of the exemption depends on a non-income based characterization of the primary activity of the establishment. See Brock v. Louvers & Dampers, Inc., supra, 817 F.2d

at 1257-59.[3]

So profound is the confusion surrounding interpretation of this exemption that the courts of appeals cannot even agree about whether their focus should be on the nature of the employee's work or on the character of the employer's business. Compare Marshall v. N.H. Jockey Club, Inc., 562 F.2d 1323, 1331, n.4 (1st Cir. 1977) ("The § 13(a)(3) exemption turns on the nature of the employer's business, not on the nature of the employee's work.") with Brennan v. Six Flags Over Georgia, Ltd., 474 F.2d 18, 19 (5th Cir. 1973) ("It is the character of the work, not the source of the remuneration, that controls.... The exemption is not a subsidy accorded to an

---

[3]A state court in the Sixth Circuit, however, has refused to follow the primary activity test by denying the exemption where an establishment engaged in some modest non-recreational activity. Webb v. Music City Service, Inc., supra, p. 14.

employer because of his principal activities.") Until this Court clarifies the meaning and applicability of the "amusement and recreational establishment" exemption, the lack of coherence in the lower courts' approach to the exemption will continue to engender confusion in the lower courts and uncertainty among employers and employees. Review should, therefore, be granted in order to establish uniformity in construing this exemption.

3. The Fifth Circuit's decision also betrays a distinct misunderstanding of or inattention to § 13(a)(3)'s history in determining its reach. The court of appeals' income test, which regards the sale of goods as a bar to the exemption, is apparently based on the 1961 antecedent of § 13(a)(3). The original version of this subsection was enacted in 1961 as part of the "retail or service establishment"

exemption which is based on income from the sale of goods. The purpose of the 1961 provision was to exempt local establishments with minimal sales income on the theory that they did not sufficiently affect interstate commerce to warrant imposition of federal wage and hour requirements. See Brock v. Louvers & Dampers, Inc., supra, 817 F.2d at 1258.

In 1966 the exemption for amusement and recreational establishments was taken out of the retail and service establishment provision and enacted as a separate subsection of § 13 of the FLSA. Pub. L. No. 89-601, Title II, § 201, 80 Stat. 833-838 (1966). This revision was intended "to establish criteria for seasonality, and - by eliminating the 'retail and service' language - to make plain that employees of seasonal amusement or recreational companies generally are exempt." Marshall

v. N.H. Jockey Club, Inc., supra, 562 F.2d at 1329; accord, Brock v. Louvers & Dampers, Inc., supra, 817 F.2d at 1257. Nowhere does this history suggest any intention to make this exemption inapplicable to retail sales businesses simply because the language was moved from the retail exemption to an independent self-sustaining subsection.

The court of appeals' income test, however, disregards this history and confines the exemption within a narrower compass than Congress intended. Because its approach is out of step with the more detailed and persuasive historical evidence found in other decisions, supra, this Court should grant review to bring the meaning of the § 13(a)(3) exemption in line with the original intent of Congress and thereby eliminate another confusing element in the disparate approaches in the lower courts.

4. Finally, the court of appeals' approach to the particular circumstances of this case underscores the special and important reasons for granting review. The lower courts paid no heed whatsoever to the legislative policy underlying the "amusement and recreational establishment" exemption. As the Sixth Circuit described this policy:

> The logical purpose of the provision is to exempt the type of amusement and recreational enterprises... which by their nature, have very sharp peak and slack seasons. These businesses argue that they should not be held to the same wage and hour requirements as permanent, year-round operations. Their particular character may require longer hours and a shorter season, their economic status may make higher wages impractical, or they may offer non-monetary rewards. Congress responded to these concerns by enacting the amusement and recreational exemption. Brock v. Louvers & Dampers, Inc., supra, 817 F.2d at 1259.

Similarly, the Tenth Circuit, in Brennan v. Yellowstone Park Lines, Inc., 478 F.2d 285, 288 (10th Cir.) cert. den. 414 U.S. 909

(1973), opined:

> The exemption... was provided... so as to allow recreational facilities to employ young people on a seasonal basis and not have to pay the relatively high minimum wages required by the [FLSA].

Despite the evidence in this case that the fireworks sold by Mr. W's vendors were exclusively for the purpose of amusement and recreation, that they were sold only during two short seasonal periods, that the fireworks were principally used by customers on two holidays within the sales periods, that customers often exploded their fireworks either in front of the stand or across the street immediately after buying them, that the fireworks are typically cheap goods selling for less than 35 cents, that the sale of fireworks is in itself often a festive event, that long hours and family labor are typical of how these stands operate, and that application of federal wage and hour requirements would

be impractical for a 24-day per year amusement business, the Fifth Circuit construed the exemption without regard to its common sense legislative purpose. The lower courts' departure from the Congressional intent to exempt precisely this type of seasonal, amusement-oriented small business from rules applicable to ordinary year-round commercial establishments should be corrected, lest the exemption be confined solely to designated amusement parks, commercial sporting events and the like.

* * *

No apparent purpose would be served by permitting the lower courts to continue feeling their way toward decisions involving this exemption, while complaining about the lack of unifying principles and the difficulty in construing the statute. Moreover, it would be a sad irony, as well

as an unwarranted statutory construction, if roadside fireworks stands selling items for celebrating July 4th and New Years Day - establishments whose character is inherently one of amusement or recreation - are not regarded as "amusement or recreational establishments." The issue as to scope of this exemption is "beyond the academic or episodic" Rice v. Sioux City Mem. Park Cemetery, 349 U.S. 70, 74 (1955), and the time is ripe to review it.

II. REVIEW SHOULD BE GRANTED TO CLARIFY THE EXTENT TO WHICH MERE DELAY, UNACCOMPANIED BY FINDINGS OF PREJUDICE OR BAD FAITH, SHOULD AFFECT A DISTRICT COURT'S DECISION UNDER FED.R.CIV.PROC. 15(a) AND FOMAN v. DAVIS, 371 U.S. 178 (1962).

1. This Court ruled in Foman v. Davis, 371 U.S. 178, 9 L.Ed.2d 222, 83 S.Ct. 227 (1962) that the mandate of Rule 15(a) that leave to amend a pleading "shall be freely given when justice so requires"

is to be heeded. 371 U.S. at 182. Acknowledging that the grant or denial of leave to amend is a matter of "discretion," this Court ruled that an "outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules." Ibid.

2. The decision of the court of appeals in this case leaves its affirmance of the district court's decision unexplained except for the ipse dixit that "justice does not so require" that leave to amend be granted in this case (A11-A12). The district court's rationale is neither more discernible nor defensible. Its reason for refusing to permit Mr. W to raise the "administrative" exemption is that the amendment would be "untimely" and that it could have been presented earlier

(A29). Although the district court mentioned that discovery had been completed, there is no finding either by the district court or by the court of appeals that any further discovery would be required (or if so, that it would delay the trial), that any delay was undue, that Mr. W had acted in bad faith or pursuant to a dilatory motive, that the Secretary would suffer any undue prejudice or that the amendment would be futile - all factors which, if true, might have supported the lower courts' exercise of discretion. Instead, the courts below relied solely on their claimed power to choose to deny leave to amend because of some delay.

The absence of a recognized justifiable reason for precluding Mr. W from asserting a statutory defense is contrary to the language and spirit of Rule 15, contrary to Foman v. Davis, supra, and

contrary to the purpose of the Federal Rules of Civil Procedure that actions will be determined on their merits and not on procedural technicalities.

To the extent that the decisions of the court of appeals and the district court can be read to mean that delay itself is the reason for denying leave to amend, that construction of Rule 15 is in conflict with the approach taken by at least three other circuits in which delay without prejudice or harassment is not a permissible reason to deny leave to amend a pleading. Farkas v. Texas Instruments, 429 F.2d 849 (1st Cir. 1970); Tefft v. Seward, 689 F.2d 637 (6th Cir. 1982); Boileau v. Bethlehem Steel Corp., 730 F.2d 929 (3d Cir. 1984). The Fifth Circuit's marked departure from the justifiably more generous approach of the cases just cited is in itself a reason for this Court to grant review of this issue to

spell out the role which mere delay may play in an application for leave to amend a pleading.

More fundamentally, however, the court of appeals has permitted a type of "discretion" not envisioned by Rule 15 and specifically disapproved by this Court in Foman v. Davis, supra. Leaving matters of pleading to a district court's discretion is not an invitation to caprice, but an entrustment to judgment. As this Court has remarked in other circumstances, such discretionary choices are not left to a court's "inclination, but to its judgment; and its judgment is to be guided by sound legal principles." U.S. v. Burr, 25 Fed. Cas. 30, 35 (CC Va. 1807)(Marshall, C.J.), quoted in Albemarle Paper Co. v. Moody, 422 U.S. 405, 416 (1975).[4]

---

[4]Finally, the context in which Mr. W tried to raise the "administrative" exemption is pertinent here. Not until

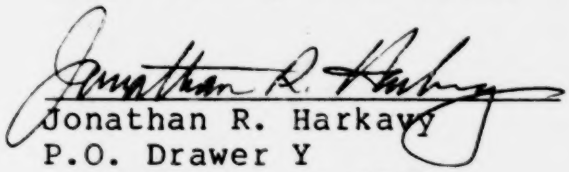
Because the refusal of the courts below to permit Mr. W to raise a statutory affirmative defense is at odds with Rule 15 and this Court's construction of the rule, this case calls for exercise of this Court's supervisory power not only to remedy a manifest injustice, but also to clarify an important aspect of practice in the federal trial courts.

November of 1987, when this Court denied certiorari on the issue of the independent contractor issue, could any "employee"-oriented exemption be applicable. Mr. W's counsel discussed the "administrative" exemption issue with the Secretary's counsel shortly after this Court's denial of certiorari and sought to amend the complaint approximately three months later. This chronology blunts the force of any suggestion by the Secretary or the courts below that Mr. W's delay was "undue."

CONCLUSION

For all of these reasons a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals of the Fifth Circuit.

Respectfully submitted,



Jonathan R. Harkavy
P.O. Drawer Y
Greensboro, NC 27402
(919) 274-2992

Counsel of Record

Of Counsel:

Norman B. Smith
Smith, Patterson, Follin, Curtis,
James, Harkavy & Lawrence
P.O. Drawer Y
Greensboro, NC 27402

L. Bruce Fryburger
1661 Frost Tower
San Antonio, TX 78205

February, 1990